



The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues

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Summary

Since 2008, the United States and nearly 40 other countries have been conducting negotiations on the Anti-Counterfeiting Trade Agreement (ACTA), a proposed agreement whose primary objective is to enhance protection and enforcement of intellectual property rights (IPR) internationally. The ACTA would create new standards for enforcement of IPR by establishing a strong legal framework for IPR enforcement, increasing international cooperation, and enhancing enforcement measures.

The ACTA is being negotiated among the governments of Australia, Canada, the 27 member states of the European Union, Japan, South Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States. It is being crafted as a “stand-alone” agreement independent of any existing international organization or agreement. Negotiations are ongoing, and currently no version of the draft negotiating text has been released officially for public circulation.

The U.S. government has made the enforcement of IPR a top priority in its trade policy, due to the importance of IPR to the U.S. economy and the potentially negative commercial, health and safety, and security consequences associated with counterfeiting and piracy. In recent years, many Members of Congress and successive Administrations have attempted to increase international protection and enforcement of IPR through various avenues of trade policy. Policymakers face a challenge of balancing the rights of intellectual property owners and their broader obligations to society. While some Members of Congress are supportive of the ACTA, others express concern about the proposed substance and process of the negotiations.

The ACTA negotiations have spurred debates among various stakeholder groups, which include intellectual property-based industries; Internet service providers; and public health, consumer rights, and civil liberties groups. There are concerns about the scope, transparency, and inclusiveness of the negotiations. Various groups also have expressed concerns about the implications of the ACTA for trade in legitimate goods, consumer privacy, and the free flow of information. With the existence of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and other international agreements on IPR, some question the rationale behind creating a new agreement to combat counterfeiting and piracy. In addition, there is speculation about the implications of the ACTA for future efforts to address IPR protection and enforcement issues through trade policy.

The Administration is negotiating the ACTA as an executive agreement, meaning that the agreement would not be subject to congressional approval of the ACTA, unless the agreement were to require statutory changes to U.S. law. However, Congress would still play an oversight role during the negotiation process. If the ACTA is concluded, implementation of the agreement may require congressional action in terms of the appropriation of federal funds.

For more on IPR, see CRS Report RL34292, *Intellectual Property Rights and International Trade*, by Shayerah Ilias and Ian F. Fergusson.

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Introduction

The idea of negotiating an Anti-Counterfeiting Trade Agreement (ACTA) was conceived in 2006 by the United States and Japan as a new tool for combating counterfeiting and piracy.¹ The ACTA was envisioned as a leadership agreement aimed creating international standards for the effective enforcement of intellectual property rights (IPR)² through greater international cooperation, a new legal framework for enforcement of IPR in both the physical and digital environment, and enhanced enforcement practices.³

The ACTA would build on the minimum standards for IPR protection and enforcement set forth by the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). It would provide IPR enforcement tools where the TRIPS Agreement and other international treaties are considered to fall short. The ACTA currently is being negotiated as an independent agreement outside of the WTO or any other international body.

During 2006 and 2007, a group of interested parties—Canada, the European Commission, Japan, Switzerland, and the United States—held preliminary talks about the proposed ACTA. In October 2007, this group of participants, perceived as “like-minded” by the Office of the U.S. Trade Representative (USTR), announced their intention to begin negotiating this new agreement. By the time that formal negotiations were launched in June 2008, the number of ACTA participants had broadened to nearly forty developed and middle-income countries: Australia, Canada, the 27 member states of the European Union, Japan, South Korea, Mexico, Morocco, New Zealand, Singapore, and Switzerland.⁴ Notably, China, India, and Brazil currently are not participants to this agreement. Negotiations on the agreement are ongoing; participants have expressed the goal of concluding the talks in 2010.

Adequate protection and enforcement of IPR are considered to play a key role in promoting innovation, which is viewed as an important source of the competitiveness of many industries in the United States and the other knowledge-based economies involved in the ACTA negotiations. Advocates of a strong international IPR regime claim that counterfeiting and piracy inflict billions of dollars of revenue and trade losses annually on legitimate IPR-based industries. They also express concern about the potential health and safety risks that counterfeit and pirated goods may pose to consumers. Some supporters of IPR also contend that certain IPR infringement operations are tied to organized criminal syndicates and terrorist financing activities.

¹ In general, counterfeiting refers to violations of trademarks, while piracy refers to violations of copyrights. However, the terms are often used interchangeably in literature on intellectual property rights (IPR).

² IPR are legal rights granted by governments to encourage innovation and creative output. They ensure that creators reap the benefits of their inventions or works and may take the form of patents, trade secrets, copyrights, trademarks, or geographical indications. Through IPR, governments grant a temporary legal monopoly to innovators by giving them the right to limit or control the use of their creations by others. IPR may be traded or licensed to others, usually in return for fees and or royalty payments.

³ For a background on intellectual property rights (IPR), see CRS Report RL34292, *Intellectual Property Rights and International Trade*, by Shayerah Ilias and Ian F. Fergusson.

⁴ The United Arab Emirates (UAE) participated in the first round of negotiations, but it has not attended subsequent rounds of negotiations.

However, some public interest groups argue that IPR protection and enforcement have tilted disproportionately in favor of private rights at the expense of broader economic and social welfare. For example, some critics assert that, while IPR protection and enforcement may promote innovation, unbalanced IPR rules may stifle the free flow of information; impede the transfer of technology from developed to developing countries; and pose challenges for public health, such as access to affordable medicines.

In recent years, many Members of Congress and successive Administrations have attempted to increase international protection and enforcement of IPR through various avenues of trade policy. Policymakers face a challenge of balancing the rights of intellectual property owners and their broader obligations to society. While some Members of Congress are supportive of the ACTA, others express concern about the proposed substance and process of the negotiations.

This report is intended to assist the 111th Congress to understand and track the progress of the negotiations. The report begins with a background section on U.S. involvement and objectives in the ACTA. It then provides a discussion of the foundation of the ACTA in current U.S. trade policy. In the next section, the report focuses on the evolution of the ACTA negotiations, the countries involved in the negotiations, and potential elements under discussion. The report concludes with an analysis of certain issues of debate raised by the negotiations and implications for congressional oversight.

U.S. Involvement and Objectives

On June 22, 2009, the United States Trade Representative, Ambassador Kirk, announced that the Obama Administration intended to move forward with the negotiation of the ACTA, which was launched under the Bush Administration. Ambassador Kirk stated, "The ACTA negotiations provide an opportunity to toughen international standards for the enforcement of intellectual property rights, making it harder for counterfeit and pirated goods to enter our country, and making the world safer for the innovation and creativity that are so critical to the U.S. economy. As we proceed with these negotiations, we will ensure that the public is kept well informed and has further opportunities to give input."⁵

Role of Administration and Congress

The United States is conducting the ACTA negotiations through the Office of the United States Trade Representative (USTR), which is located in the Executive Office of the President (EOP). The USTR has the lead on negotiating U.S. trade agreements in international forums. It crafts U.S. trade policy through an interagency process that includes the Department of Commerce, Department of Justice, Department of State, and Department of the Treasury. The USTR also consults its formal trade advisory groups, key congressional committees, and various private sector, non-governmental, and civil society stakeholder groups.

⁵ Office of the U.S. Trade Representative (USTR), "Ambassador Ron Kirk Announces Plan to Move Forward with the Negotiation of the Anti-Counterfeiting Trade Agreement (ACTA)," press release, June 22, 2009, <http://www.ustr.gov/about-us/press-office/press-releases/2009/june/ambassador-ron-kirk-announces-plan-move-forward-negot>. USTR, "Remarks by Ambassador Ron Kirk at the Global Intellectual Property Center Annual Summit," press release, September 30, 2009.

The ACTA is being negotiated by the Administration as an executive agreement, meaning that the agreement would not be subject to congressional approval, unless the agreement were to require statutory changes to U.S. law. The USTR maintains that it is negotiating the ACTA under a premise of consistency with U.S. law.⁶

The use of an executive agreement to conduct the ACTA negotiations is a departure from the way that the United States has pursued IPR goals in other international trade negotiations. In general, the United States has advanced IPR goals internationally as part of congressional-executive trade agreements or treaties, subject to congressional approval.⁷

U.S. Motivations for Negotiating the ACTA

The United States has had longstanding concerns about the rise in global IPR infringement, which can impose substantial costs to U.S. firms and pose risks to U.S. consumers. The costs of research and development are high for many IPR-based industries. For example, according to the Pharmaceutical Research and Manufacturers of America (PhRMA), it takes about 10 to 15 years of research and development to create a new drug. PhRMA member companies collectively spent an estimated \$50.2 billion for research and development (domestic and abroad) in 2008.⁸ In contrast, IPR infringement is characterized presently by low risks, little initial capital investment, and a high profit margin. The development of technologies and products which can be easily duplicated, such as digital media, has led to an increase in piracy. Growing Internet usage also has contributed to the distribution of counterfeit and pirated products. Additionally, civil and criminal penalties often are not sufficient deterrents for counterfeiting and piracy. What follows is a survey of some of the key rationales—economic, health and safety, and security—cited by the United States as motivations for negotiating the ACTA.

Economic Rationale

While the United States and other participants to the ACTA claim that the magnitude of trade in counterfeit and pirated goods and the associated economic losses are substantial, it is difficult to quantify these assertions. The very nature of IPR infringement—secretive and illicit—makes it difficult to track production and trade in counterfeit and pirated goods. Compared to counterfeit and pirated “tangible” goods, piracy of digital media may be even more difficult to track, as they increasingly are disseminated by the Internet, further complicating data collection efforts. In some cases, companies may be reluctant to release information about IPR infringement problems that they face with their branded products out of concern that such public information may affect the marketing of their products.⁹

Nevertheless, various organizations and industry groups have developed methodologies and compiled data in efforts to measure the extent of IPR infringement and its impact on legitimate

⁶ Meeting with USTR official, January 22, 2010.

⁷ CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties*, by Jeanne J. Grimmer.

⁸ Pharmaceutical Research and Manufacturers of America (PhRMA), *Pharmaceutical Industry Profile 2009*, Washington, D.C., April 2009, p. 50.

⁹ Kevin Outterson and Ryan Smith, “Counterfeit Drugs: The Good, the Bad, and the Ugly,” *Albany Law Journal of Science and Technology*, vol. 525 (2006).

producers and consumers. For instance, a study by the Organization for Economic Co-operation and Development (OECD) estimates that trade in counterfeit “physical” goods totals more than \$200 billion annually, based on international data extrapolated from national customs estimates.¹⁰

U.S. industries that rely on IPR protection claim to lose significant revenue annually due to piracy, or the unauthorized production of a product that incorporates a protected aspect. For instance, according to the International Intellectual Property Alliance (IIPA), an association representing copyright-based industries, copyright piracy in 48 countries and territories resulted in an estimated \$16.7 billion in trade losses for U.S. firms during 2008.¹¹ PhRMA previously released annual estimates of U.S. pharmaceutical industry losses from foreign violations of data exclusivity and patent protection. However, in recent years, PhRMA has not released such estimates due to complications in measuring such losses.¹²

On the opposing side, some question the commercial rationale for the ACTA. Some observers point out that many of the estimates for losses associated with IPR infringement are generated by industry groups, which may have self-interested motivations.¹³ Some analysts question the proposition that sales of pirated goods translate directly into revenue losses for legitimate firms. For example, some consumers who purchase an IPR-infringing product may not be able or willing to purchase the legitimate version of the product at the market price offered absent IPR infringement. Others also question the statistical techniques used to develop these estimates.

Some advocates of civil liberties assert that government discussions about ACTA may not be fully evaluating the economic and commercial benefits of exceptions and limitations to exclusive rights. By one estimate, businesses that rely on “fair use” exceptions to U.S. copyright law contribute \$2.2 trillion to the U.S. economy.¹⁴

Health and Safety Rationale

Some proponents of the ACTA tie counterfeiting and piracy to health and safety concerns. They argue that counterfeit products, such as fake medicines or auto parts, may be substandard and pose threats to the health and safety of consumers. In contrast, some public health advocates maintain that there has been a conflation of counterfeiting of goods with the health threats posed by those goods. It is conceivable that a medicine can be legitimate, not infringing on an IPR, and still pose health and safety threats if it is substandard. Conversely, it also is conceivable that a medicine can be counterfeit—for instance, violating a trademark—and not pose health and safety threats.

¹⁰ Organization for Economic Co-operation and Development (OECD), *The Economic Impact of Counterfeiting and Piracy*, 2007.

¹¹ IIPA, *USTR Decisions: 2007 and 2008 Estimated Trade Losses Due to Copyright Piracy and Estimated Levels of Copyright Piracy*, issued June 30, 2009.

¹² PhRMA annual industry reports. Telephone conversation with PhRMA official, March 9, 2010.

¹³ Monika Ermert, “Speculation Persists on ACTA as First Official Meeting Concludes,” *Intellectual Property Watch*, June 5, 2008. Robin Gross, *IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA)*, IP Justice, March 25, 2008, p. 6.

¹⁴ Thomas Rogers and Andrew Zamosszegi, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, Prepared for Computer & Communications Industry Association (CCIA), September 2007. CCIA, “Fair Use Doctrine Vital for All of Us,” press release, November 18, 2009, <http://www.ccia.net.org/index.asp?sid=5&artid=125&evtfld=False>.

Security Rationale

Counterfeiting and piracy may be associated with broader forms of criminal activity.¹⁵ Organized crime syndicates may find the immense profits derived from copyright infringement to be highly attractive. Some have linked copyright piracy to other illicit activities conducted by organized crime syndicates, such as drug smuggling, trade in illegal arms, and money laundering.¹⁶ Others argue that such claims are tenuous and based more on anecdotal information than quantifiable data. They also argue that, while there may be isolated incidences of IPR tied to organized criminal syndicates, this is not a widespread problem.

U.S. Trade Policy and Building Blocks for the ACTA

The United States is negotiating the ACTA as part of its trade policy agenda.¹⁷ Promoting the enforcement of IPR is an important component of U.S. trade policy. The USTR maintains that inadequate protection of IPR weakens U.S. comparative advantages in innovation and creativity and seeks to “address insufficient protection of intellectual property rights by negotiating and enforcing effective intellectual property protection in a manner compatible with basic principles of the public welfare.”¹⁸ The United States has advanced its IPR objectives through a variety of trade policy mechanisms. What follows is a discussion of some of the building blocks for the ACTA found in U.S. trade policy.

WTO TRIPS Agreement

The ACTA is intended to build on the commitments set forth by the WTO TRIPS Agreement, the prevailing multilateral framework for creating international rules on protection and enforcement of IPR. The United States has posited that the negotiation of a new agreement, i.e., the ACTA, could fill in gaps in the TRIPS Agreement for addressing IPR challenges.¹⁹ Some contend that the 1995 TRIPS Agreement does not adequately address IPR infringement issues associated with new and emerging technologies or provide effective tools for combating the proliferation of piracy in digital media.

The TRIPS Agreement seeks a balance of rights and obligations between private rights and the public obligation “to secure social and cultural development that benefits all.”²⁰ Although the TRIPS Agreement has been in existence for more than a decade, there are still a number of longstanding debates about the legitimacy and fairness of the agreement in balancing these rights. On the one hand, for many economically advanced countries, the TRIPS Agreement represents a

¹⁵ USTR, *2009 Special 301 Report*, April 30, 2009.

¹⁶ Gregory F. Treverton et al., *Film Piracy, Organized Crime, and Terrorism*, RAND Corporation, 2009.

¹⁷ See “Other Multilateral Activities” chapter, p. 20 of USTR, *The President’s 2010 Trade Policy Agenda*, <http://www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report>.

¹⁸ USTR, *The President’s 2010 Trade Policy Agenda*, p. 9.

¹⁹ USTR, *The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion*, updated November 6, 2009.

²⁰ Pascal Lamy, “Trade-Related Aspects of Intellectual Property Rights – Ten Years Later,” *Journal of World Trade*, October 2004, p. 925.

“floor” for IPR protection and enforcement by setting minimum standards. On the other hand, many developing countries view the standards set by the TRIPS Agreement as far more than “minimum.” Given that debates surrounding the TRIPS Agreement have not settled, policies pursued by the United States and other industrialized countries to build on the TRIPS Agreement have generated controversy in public policy debates.

Regional and Bilateral Free Trade Agreements

The United States pursues international IPR support through regional and bilateral free trade agreements (FTAs). In negotiating recent FTAs, the USTR frequently has sought levels of protection that exceed the minimum standards of the TRIPS Agreement, in areas such as patents and copyrights. The pursuit of these so-called “TRIPS-plus” provisions has generated an ongoing debate about the appropriate balance of rights and obligations under an IPR regime. Following the May 10, 2007 Bipartisan Trade Agreement between Congress and the Bush Administration, some of the IPR provisions were scaled back in the Peru FTA and the proposed FTAs with Panama and Colombia.

U.S. FTAs may lend themselves as models for the ACTA. The United States has stated that it seeks to model the ACTA on the IPR enforcement provisions found in the U.S. FTAs with Australia, Morocco, and Singapore and the proposed FTA with South Korea. These agreements include provisions on “criminal penalties and procedures in cases of willful trademark counterfeiting or copyright piracy on a commercial scale; border measures in cases involving trademarks and copyrights; and civil remedies for all intellectual property rights (e.g., patent, trademark, copyright), with appropriate limitations that ensure consistency with U.S. law.”²¹ These four FTAs arguably have the most stringent IPR provisions of all U.S. FTAs to date. For the United States, the ACTA represents an opportunity to expand the stronger IPR commitments found in these bilateral agreements to a broader set of countries. The proposed U.S. FTA with South Korea, in particular, may serve as a “gold standard” for the ACTA.²²

While the title of the agreement denotes it as a “trade agreement,” the ACTA—as currently being fashioned—differs in nature from other U.S. regional and bilateral trade agreements. Traditionally, U.S. trade agreements have been rules-based arrangements where the United States and trading partners agree to trade liberalization measures, including eliminating tariff and non-tariff barriers to trade among the countries participating in the free trade area. In contrast, the USTR has portrayed the ACTA as a leadership and standards-setting agreement.²³ Another way that the ACTA would differ from traditional trade agreements is in its coverage of issues. Trade agreements negotiated by the United States tend to be broadly focused, covering a range of issues of which IPR is one. Other issues covered include market access, tariff barriers, government procurement, services, investment, and rules of origin. The ACTA, in contrast, would focus more narrowly on IPR issues.

²¹ Letter from The Honorable Ron Kirk, U.S. Trade Representative, to The Honorable Ron Wyden, U.S. Senator, January 28, 2009.

²² Meeting with USTR official, January 22, 2010.

²³ USTR, *The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion*, updated November 6, 2009.

The ACTA Negotiations

The objective of the ACTA is to enhance efforts to combat counterfeiting and piracy internationally through increasing cooperation among governments, establishing a strong legal framework for IPR enforcement, and enhancing enforcement measures. It is being crafted as a “stand-alone” agreement independent of any existing international organization. This section reviews the evolution of negotiations, the participants involved in the negotiations, and key elements under discussion.

Evolution of Negotiations

When the ACTA talks were formally announced in August 2008, the United States sought to conclude the agreement by the end of that year.²⁴ However, to date, seven rounds of formal ACTA negotiations have taken place (see **Table 1** for history of negotiations). With ACTA negotiations ongoing, the G-8 summit declaration of 2009 stated that ACTA, “which the participants should seek to agree as soon as possible, represent[s] an important opportunity to strengthen standards for enforcement of IPR.”²⁵

The latest round of negotiations took place in January 2010 in Guadalajara, Mexico. A press release by the countries involved in the ACTA stated: “Participants underlined the importance of ACTA as an agreement which shall provide for an enhanced framework to fight global infringement of intellectual property rights, particularly in the context of counterfeiting and piracy.” The talks centered on civil enforcement, border enforcement, and enforcement of rights in the digital environment. Participants reaffirmed their commitment to increase efforts to provide “opportunities for meaningful public input” and “collectively enhance transparency.” They also reaffirmed their commitment to continue the negotiations with the aim of concluding the agreement by the end of 2010.²⁶

Table 1. Formal Rounds of Negotiations of Proposed ACTA

Round	Date	Location	Topics
1	June 3-4, 2008	Geneva, Switzerland	Border Measures
2	July 29-31, 2008	Washington, D.C.	Civil Remedies for Infringement, Border Measures
3	October 8-9, 2008	Tokyo, Japan	Criminal Enforcement, Scope of Agreement
4	December 15-18, 2008	Paris, France	International Cooperation, Enforcement Practices, Institutional Issues, Transparency
5	July 16-17, 2009	Rabat, Morocco	International Cooperation, Enforcement Practices, Institutional Issues, Transparency

²⁴ USTR, “Trade Facts: Anti-Counterfeiting Trade Agreement (ACTA),” August 4, 2008.

²⁵ G8, *G8 Leaders Declaration: Responsible Leadership for a Sustainable Future*, July 10, 2009.

²⁶ USTR, “Office of U.S. Trade Representative Releases Statement of ACTA Negotiating Partners on Recent ACTA Negotiations,” press release, February 2, 2010.

Round	Date	Location	Topics
6	November 4-6, 2009	Seoul, Korea	Enforcement in Digital Environment, Criminal Enforcement, Transparency
7	January 26-29, 2010	Mexico	Civil Enforcement, Border Measures, Internet Provisions, Transparency

Source: Swiss Federal Institute of Intellectual Property, USTR.

Characteristics of Current ACTA Participants

The majority of the countries involved in the ACTA negotiations are economically advanced countries. They generally consider IPR-based industries to be important to their economies. Together, these countries constitute roughly half of total world merchandise exports. The USTR perceives the number of initial participants in the ACTA effort to constitute a “critical mass of key trading partners.”²⁷

Participants to the ACTA negotiations tend to be engaged in international trade liberalization efforts (see **Table 2**). All of the countries presently involved in the talks have acceded to the WTO TRIPS Agreement. Most have implemented the World Intellectual Property Organization (WIPO) “Internet” treaties. The United States has implemented or is negotiating regional and bilateral FTAs with several of the ACTA participants.

Some observers have questioned why countries designated in the USTR’s Special 301 report for having inadequate IPR protection and environment are involved in the ACTA. The 2009 Special 301 Report included Canada on the Priority Watch List and Mexico and several European Union members (Finland, Hungary, Poland, Romania, and Spain) on the Watch List.²⁸ The USTR hopes that participation in the ACTA will help these countries identified in the Special 301 report to attain their goals of enhancing IPR enforcement.²⁹

Table 2. Status of ACTA Participants in Selected Other Trade Agreements

ACTA Participant	WTO TRIPS Agreement	WIPO Internet Treaties	U.S. Regional FTA	U.S. Bilateral FTA
Australia	✓	In-Force	TPP Under Negotiation	U.S.-Australia FTA (In-Force)
Canada	✓	Signature	NAFTA (In-Force)	U.S.-Canada FTA
European Union	✓	Signature	---	---
Japan	✓	In-Force	---	---

²⁷ USTR, “Trade Facts: Anti-Counterfeiting Trade Agreement (ACTA),” August 4, 2008, p. 2.

²⁸ The “Priority Watch List” and “Watch List” are administrative categories created by the USTR for country identification in the Special 301 report.

²⁹ *Ibid.*, p. 3.

ACTA Participant	WTO TRIPS Agreement	WIPO Internet Treaties	U.S. Regional FTA	U.S. Bilateral FTA
Mexico	✓	In-Force	NAFTA (In-Force)	---
Morocco	✓	Not a member	---	U.S.-Morocco FTA (In-Force)
New Zealand	✓	Not a member	TPP Under Negotiation	TPP Under Negotiation
Korea	✓	In-Force	---	U.S.-Korea FTA (Proposed)
Singapore	✓	In-Force	TPP Under Negotiation	U.S.-Singapore FTA (In-Force)
Switzerland	✓	In-Force	---	---
United States	✓	In-Force	N/A	N/A

Source: CRS analysis, drawing from information provided by the WTO, WIPO, USTR.

Notes:

- a. WIPO Internet Treaties refer to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.
- b. The TPP is the Trans-Pacific Strategic Economic Partnership, a high-standard FTA being negotiated among Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru, Vietnam, and the United States.
- c. The NAFTA is the North American Free Trade Agreement, negotiated among the Canada, Mexico, and the United States.
- d. The U.S.-Canada FTA was expanded into the NAFTA.

Potential Provisions in the ACTA

Governments participating in the ACTA talks have engaged in “closed-door” negotiations. At this time, there is no publicly available copy of the draft negotiating text of ACTA. Not surprisingly, there has been enormous speculation on the part of various groups about the objective, scope, and elements of the proposed ACTA. As negotiations have progressed, participants to the ACTA have released more information about the potential components of the ACTA. A key development took place in April 2009, when the country governments released a fact sheet outlining elements potentially under discussion. According to the fact sheet, certain issues that have been raised as possible elements of the ACTA are a legal framework for enforcement in both the physical and digital environments, international cooperation, enforcement practices, and institutional arrangements. Classified discussion papers, notes, and other documents also have been leaked to the general public via unknown sources.³⁰ However, what follows is a review of potential components of an agreement, drawn from information officially disseminated by the USTR to the general public.

³⁰ Rob Pegoraro, "Copyright overreach goes on world tour," *The Washington Post*, November 15, 2009, p. G.1.

Legal Framework for Enforcement

Potential provisions under the legal framework chapter of the ACTA may include civil and criminal enforcement, border measures, and enforcement issues related to the digital environment.

Civil Enforcement

The civil enforcement section would address the authorities granted to courts and other competent authorities to order or take specific actions when IPR violations have been identified. Issues under discussion in this area include:

- the types of intellectual property that would be covered under the civil enforcement section;
- the damages available in civil infringement cases;
- the authority of judicial authorities to order injunctions requiring parties to desist from an IPR infringement;
- the remedies available to address IPR infringement, including the destruction of goods that have been found to be counterfeit; and
- the authority for judicial authorities to seize goods, materials, or documentary evidence without necessarily hearing from all parties involved.

Criminal Enforcement

Possible issues that may be addressed under criminal enforcement include:

- the threshold of IPR infringement necessary to qualify for criminal sanctions in cases of trademark counterfeiting, copyright piracy, and other forms of piracy;
- the range of criminal penalties in such cases;
- the situations in which relevant authorities should be empowered to take action against IPR violators on their own initiative regarding infringing activities;
- the authority to order searches and/or seizures of goods suspected of IPR infringement;
- the authority of judicial authorities to order forfeiture and destruction of infringing goods, assets derived from infringing activity, and materials used for the production of infringing goods; and
- criminal procedures and penalties in cases of camcording audiovisual works and trafficking of counterfeit labels.

Border Enforcement

ACTA participants may address issues related to actions that customs and other authorities would be authorized to take to prevent IPR-infringing goods from crossing borders. Border enforcement issues under discussion include:

- which IPR would be covered and whether border measures would apply only to imports, or also to exports and in-transit goods;
- granting customs officials *ex-officio* authority, meaning the right to seize or detain goods at the border that are suspected of being counterfeit without being requested to do so by rights holders or receiving a court order;
- the right of border authorities to impose deterrent penalties;
- the procedures for determining whether suspended goods violate IPR;
- measures to ensure that infringing goods are not released into circulation with the permission of the right holder;
- the forfeiture and destruction of goods determined to infringe IPR; and
- the ability to disclose key information about infringing shipments to owners of IPR.

IPR Infringement in Digital Environment

The digital enforcement section is intended to address unique challenges posed by new technologies for the enforcement of IPR. One possible element of discussion is the roles and responsibilities of Internet service providers (ISPs) to combat illegal use of intellectual property over their networks and the liabilities that might be imposed on ISPs if they do not uphold these obligations. Among obligations imposed on ISPs, one might be the obligation to hand over data about the identity of alleged infringers. In addition, this section of the ACTA may include provisions on providing remedies against circumvention of technological protection measures used by right owners to prevent the use of their copyrighted work in unwanted ways.

International Cooperation

The international cooperation chapter may include provisions on capacity building and technical assistance for developing countries. It also may discuss international cooperation among enforcement agencies, which could involve exchanging best practices and statistics on IP enforcement efforts.

Enforcement Practices

The ACTA also may include a chapter on the methods, or enforcement practices, used by authorities to apply IPR laws. Areas that may be covered in this section include:

- methods for promoting expertise among authorities to ensure effective enforcement of IPR;
- the collection and analysis of statistical data and other information, such as best practices, concerning IPR infringement;
- internal coordination among enforcement authorities, including “formal or informal public/private advisory groups;”
- measures to allow customs authorities to better identify and target shipments suspected to contain counterfeit or pirated goods; and

- measures for raising consumer and public awareness regarding IPR infringement.

Institutional Arrangements

The ACTA also would include a chapter on institutional arrangements necessary for implementing the ACTA.

Points of Debate: Issues for U.S. Policy

The ACTA negotiations have spurred debates among various stakeholder groups within and among the various countries on both process and substance. Certain stakeholders have voiced concerns about the scope, transparency, and inclusiveness of the negotiations. Members of the U.S. business community, such as the entertainment, pharmaceutical, luxury goods, and high technology industries, largely have been supportive of the ACTA. They assert that stronger international IPR protection and enforcement through the ACTA are critical for their competitiveness. Others business groups, including Internet service providers, have expressed concerns about the digital enforcement provisions of the proposed agreement. In addition, various civil society groups, such as public health and consumer rights advocates, have expressed concerns about the implications of the ACTA for trade in legitimate goods, consumer privacy, and free flow of information. With the existence of the WTO TRIPS Agreement and other international agreements on IPR, some question the rationale behind creating a new agreement to combat counterfeiting and piracy. The following section fleshes out some of these key points of debate.

Scope of the Agreement

As ACTA negotiations have progressed, the scope of IPR infringement being addressed in the agreement has broadened. As titled, the ACTA suggests that it would focus on combating counterfeit goods. While definitions of “counterfeiting” vary, the term tends to refer to trademark infringement of physical goods. In the WTO TRIPS Agreement, the term “counterfeiting” is used in conjunction with trademark infringement. As a result, when the agreement was proposed initially, many observers believed that it would focus primarily on combating trade of fake medicines, toys, auto parts, computer parts, and the like. In addition to counterfeiting, the ACTA also would address piracy. Again, while definitions of “piracy” vary, the term generally refers to infringement of copyrights. The ACTA would focus on copyright piracy of physical goods and in the digital environment.

Some groups have expressed concern that the ACTA does not appear to make a distinction between counterfeiting and piracy, which may carry different risks.³¹ Others suggest that the ACTA is expanding the rubric of IPR infringement traditionally denoted under the term “counterfeiting.”

According to press reports, ACTA participants differ on whether major provisions in the agreement should cover all IPR, including patents, or should be limited to copyrights and

³¹ Christine Mumford, “ACTA Treaty Lauded by Rights Owners, Criticized by Others as Secretive, Restrictive,” *International Trade Daily*, June 9, 2008.

trademarks. For example, Singapore, Canada, and New Zealand reportedly want to restrict the civil remedies section to copyrights and trademarks, while the United States and European Union have advocated for expanding this section to all IPR.³²

There also has been debate on including geographical indications in the ACTA.³³ The European Union has advocated for the inclusion of patents and GIs in the ACTA, while the United States has objected to such proposals.³⁴ Discussion on GIs has contributed to inaction in the WTO Doha Round of agricultural negotiations, and EU officials may be keen to pursuing GI protections through other forums, such as the ACTA negotiations.

Transparency of Negotiations

Among some groups, there is a perception that the ACTA negotiations have lacked sufficient public transparency. Some critics assert that governments have engaged in close consultation with right holders, including representatives of the entertainment, software, apparel, and pharmaceutical industries, but have not engaged in extensive consultations with consumer and public interest groups.³⁵

There has been debate among countries involved in the ACTA negotiations on publicly circulating the draft chapters of the proposal.³⁶ Japan and South Korea reportedly have called for keeping the entire ACTA text classified until the negotiations have completed, while others have advocated for releasing the chapter focused on digital enforcement, one of the more controversial chapters of the agreement.

Some observers have commented that the level of secrecy in the ACTA negotiations is unprecedented, compared to other international trade negotiations. They point out that draft texts for other international trade treaties, such as the WTO TRIPS Agreement, were released during their respective negotiation. Other observers note that texts of agreements negotiated under TPA were not released until they were finalized.

Further, some public interest groups argue that ACTA differs from other trade agreements negotiated by the USTR, and that the level of confidentiality applied by USTR is excessive. A letter to President Obama from several public interest groups states: "Much of ACTA's transparency deficit stems from the disconnect between ACTA's apparent aims and its formulation as a trade agreement. In negotiating agreements focusing on traditional trade matters..., confidentiality regarding some negotiating positions may be appropriate. But ACTA aims to set international legal norms..."³⁷

³² Erik Wasson, "Leaked EU Document Reveals Major Differences on ACTA Provisions," *World Trade Online*, March 5, 2010.

³³ Geographical indications (GIs) act to protect the quality and reputation of a distinctive product originating in a certain region; however, the benefit does not accrue to a sole producer, but rather the producers of a region.

³⁴ "USTR Seeks Advice on ACTA Internet Chapter Proposal," *U.S. Trade*, September 18, 2009.

³⁵ "Numerous Firms Reviewed Draft Treaty Proposal on IP," *CongressDaily/A.M.*, October 16, 2009.

³⁶ Amy Tsui, "ACTA Still Too Secret, Nonprofit Says, As Sixth Round of Talks Under Way in Korea," *International Trade Daily*, November 6, 2009.

³⁷ Letter from American Association of Law Libraries, et al. to President Obama, November 5, 2009.

Ambassador Kirk has defended the ACTA negotiation process, maintaining: “As is customary during negotiations among representatives of sovereign states, the negotiators agreed that they would not disclose proposals or negotiating texts to the public at large, particularly at earlier stages of the negotiation. This is done to allow participants to exchange views in confidence, facilitating the negotiation and compromise that are necessary to reach agreement on complex issues.”³⁸

USTR has pointed out that it issued public notices regarding the ACTA. On February 17, 2008, the USTR issued a *Federal Registrar* notice requesting public comments on the ACTA. The comment period lasted through March 21, 2008.³⁹ Groups that submitted comments to the USTR included a range of business, consumer, and public interest stakeholder groups. Subsequently, on September 5, 2008, the USTR issued a notice inviting stakeholders to a public meeting that it would hold for interested parties, in conjunction with the Department of Commerce, regarding the ACTA. The meeting was held on September 22, 2008.⁴⁰ While there currently is no official comment period, the USTR has said that it continues to welcome public comments on the ACTA.⁴¹ However, among some observers, there is the view that the negotiations have been conducted at a relatively “hurried pace,” limiting the ability of stakeholders to provide meaningful comments.

On September 17, 2008, the Electronic Frontier Foundation (EFF) and Public Knowledge, two public interest groups, sued USTR under the Freedom of Information Act (FOIA) to obtain the negotiating text of the agreement. USTR has responded that negotiations are still at the conceptual phase, and that “understandings of confidentiality” are routine in negotiating trade agreements. The USTR cited security and foreign policy reasons for not releasing information under the FOIA request.⁴²

Some watchdog groups have questioned this rationale, asserting that there is no “public policy reason” to conduct the negotiations in such obscurity.⁴³ EFF and Public Knowledge decided to terminate the lawsuit on June 17, 2009, following the Obama Administration’s signal that it intends to defend the national security classification of the ACTA documents in court. The two public interest groups asserted that they would pursue other avenues to press the Obama Administration to be more transparent regarding the ACTA.⁴⁴

Some Members of Congress and a range of stakeholders have called on the USTR to enhance the transparency of the ACTA negotiations. In a letter addressed to USTR, Senators Bernard Sanders and Sherrod Brown called on USTR to allow the public to review and comment on substantive proposals for the proposed ACTA. The two senators raised skepticism that disclosures of basic

³⁸ USTR, “Ask the Ambassador,” question on the ACTA negotiation process, September 23, 2009.

³⁹ Office of the USTR, “Anti-Counterfeiting Trade Agreement (ACTA): Request for Public Comments,” 73 *Federal Register* 8910-8911, February 17, 2008.

⁴⁰ Office of the USTR, “Anti-Counterfeiting Trade Agreement (ACTA): Notice of Public Meeting,” 73 *Federal Register* 51860-51861, September 5, 2008.

⁴¹ Telephone conversation with USTR official, November 10, 2009.

⁴² Letter from Elizabeth V. Baltzan, Associate General Counsel, Executive Office of the President, Office of the U.S. Trade Representative, to Gwen Hinze, Electronic Frontier Foundation, January 16, 2009.

⁴³ Andrew Noyes, “USTR Outlines Agenda for IP Talks,” *CongressDaily/P.M.*, October 9, 2009.

⁴⁴ EFF, “EFF and Public Knowledge Reluctantly Drop Lawsuit for Information About ACTA,” June 17, 2009, <http://www.eff.org/press/archives/2009/06/17>.

information in the ACTA would constitute a national security risk for the United States and asserted that the Administration's decision to not publicly circulate the ACTA proposals is a method for avoiding criticism over controversial parts of the agreement.⁴⁵

The U.S. Chamber has expressed support for greater transparency, stating: "We recognize the constraints of international trade negotiations; however, we urge the administration to ensure the Congressional committees of jurisdiction—as representatives of the American people—are fully briefed on the scope of the ACTA negotiations and why concluding this agreement expeditious is in the country's best interests."⁴⁶

While USTR has refrained from publicly circulating the draft text of the ACTA, citing security reasons, it has consulted with congressional committees of jurisdiction regarding the ACTA. In addition, USTR reportedly has shared a draft of the digital enforcement chapter with cleared advisors in the USTR formal trade advisory system and selected industry and public interest groups, who were required to sign non-disclosure agreements in order to view the negotiating text.⁴⁷

Developing Country Participation

Some groups are critical that the ACTA is being negotiated as a plurilateral agreement primarily among developed and middle-income countries.⁴⁸ Some developing country advocates express concern that the ACTA negotiations may not sufficiently take into account the interests, views, and needs of developing countries.

Participants have discussed expanding the ACTA to include interested developing countries in the future.⁴⁹ The USTR has expressed hope that other countries will join the ACTA over time, "reflecting the growing international consensus on the need for strong IPR enforcement." However, some critics speculate that developing countries would be invited to join the ACTA at a stage of the negotiations when the agreement has largely been established, or "locked-in," when significant changes could not be introduced. Some groups voice concern that developing countries will feel pressured to adhere to the ACTA in order to obtain trade benefits from ACTA participants.⁵⁰

In addition to questions of fairness, some observers question the effectiveness of an agreement that does not include countries like China and Russia, which are considered to be major sources of counterfeiting and piracy.

⁴⁵ Letter from The Honorable Bernard Sanders, U.S. Senator, and The Honorable Sherrod Brown, U.S. Senator, to The Honorable Ron Kirk, U.S. Trade Representative, November 23, 2009.

⁴⁶ U.S. Chamber, "U.S. Chamber Urges Further Progress in Mexican ACTA Negotiations: Chamber's Global IP Center Calls for Increased Transparency," press release, January 26, 2010.

⁴⁷ "Numerous Firms Reviewed Draft Treaty Proposal on IP," *CongressDaily*, October 14, 2009.

⁴⁸ Monika Ermert, "Embattled ACTA Negotiations Next Week in Geneva; US Sees Signing This Year," *Intellectual Property Watch*, May 2009.

⁴⁹ USTR, *The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion*, April 6, 2009.

⁵⁰ Robin Gross, *IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA)*, IP Justice, March 25, 2008.

Impact on Legitimate Trade and Consumer Activity

Among stakeholders, there is a vigorous debate on how balanced the ACTA would be in protecting the rights of IPR-owners and consumers. IPR-based businesses assert that protection and enforcement of IPR is critical to their businesses. Some anti-piracy advocates also call for greater IPR protection and enforcement due to health, safety, and security concerns. Other stakeholders, including some consumer rights, public health, and civil liberty groups, contend that ACTA provisions may interfere with trade in legitimate goods and consumer activity. This speaks to a longstanding broader debate about the perceived trade-off between the protection of IPR and the facilitation of trade.

One prominent aspect of this debate is a border enforcement provision under discussion that would give customs officials *ex-officio* authority to seize and detain goods suspected of infringing IPR. Some countries that are participants to the ACTA negotiations do not empower their customs officials with such *ex-officio* authority. Others also grant this authority in limited cases. In the United States, the U.S. Customs and Border Protection (CBP) is authorized to make determinations that goods violate copyrights and trademarks and seize such goods. However, the CBP is not authorized to make determinations of patent violations.⁵¹ In the case of patents, CBP enforces exclusion and cease-and-desist orders issued by the U.S. International Trade Commission (ITC) against patent-infringing goods. The inclusion of patents in the ACTA in this manner would be a departure from present practices by the U.S. CBP. USTR has stated that it would not accept any proposals from other countries that would require a statutory change to U.S. law.

Many business groups assert that granting customs officials *ex-officio* authority is critical to preventing the flow of counterfeit and pirated goods across borders. This would ensure that customs officials can engage in more proactive efforts to combat counterfeiting and piracy, without having to wait for a formal complaint from a private party or right holder. Some critics, such as public interest and civil liberties groups, assert that such measures would impose unnecessary or burdensome delays on the movement of goods across borders, raise the costs of trade, and result in unduly impediments of personal travel. At an extreme, some groups are worried that the ACTA might result in searches of personal laptops and MP3 players at airports. USTR has dismissed these allegations.⁵²

If the ACTA is crafted to address patents, some public health advocates express concern that empowering customs authorities to make determinations about patent violations may lead to the prevention or delay of exports and imports of legitimate generic drugs.⁵³ For instance, some groups express concern that the ACTA may “interfere with legitimate parallel trade in goods, including the resale of brand-name pharmaceutical products...”⁵⁴ They point to recent seizures in Europe of legitimate generic medicines in-transit based on industry concerns of counterfeiting.

⁵¹ See CRS Report RS22880, *Intellectual Property Rights Protection and Enforcement: Section 337 of the Tariff Act of 1930*, by Shayerah Ilias.

⁵² USTR, *The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion*, updated November 13, 2009.

⁵³ Meeting with Oxfam representative, October 27, 2009.

⁵⁴ Letter from Essential Action et al. to Ambassador Susan C. Schwab, USTR, September 15, 2008.

Potential ACTA provisions regarding piracy in the digital environment also have been the subject of much debate. There is speculation that Internet Service Providers (ISPs) would be obligated to terminate customers' Internet accounts after repeated allegations of copyright infringement. For instance, such provisions reportedly have been controversial in the European Union, where some members of Parliament consider Internet access to be a fundamental human right that should only be terminated by judges.⁵⁵

While many IPR-based industries argue that such increasing ISP involvement in IPR enforcement is critical to combating online piracy, critics argue that requiring ISPs to filter communication places undue burdens on ISPs. Some civil liberties groups have expressed concern about what they perceive as a low threshold for terminating consumers' Internet access; they assert that proof of online piracy, not allegations, should be the requirement for termination of Internet accounts.

Also under debate are potential ACTA provisions on international cooperation. Some commentators suggest that the ACTA may require ISPs to release certain consumer data to governments and that such data might be shared across governments. Proponents argue that international sharing of data would enhance greater coordination by countries on IPR protection and enforcement, while critics express concerns that such actions would infringe on consumer rights. During the ACTA negotiations, the European Union reportedly has advocated for stronger privacy provisions than supported by the United States.⁵⁶

In addition, some commentators have been concerned with the extent to which U.S. "fair use" practices would be maintained under an agreement. In contrast to the United States, most European Union countries tend to have narrower fair use provisions.⁵⁷ There has been speculation about potential ACTA provisions on providing remedies against circumvention of technological protection measures used by right owners to prevent the use of their copyrighted works in unwanted ways. Such provisions may have implications for the free flow of information.

Given that negotiations are ongoing and limited information has been released about the negotiations, it is difficult to speculate how the ACTA may affect these areas of concerns. According to the USTR fact sheet from April 2009, the proposed ACTA is intended to respect the WTO Doha Declaration on Public Health. The USTR also stated that the ACTA is intended to focus on commercial-scale infringement and is not intended to interfere with citizens' fundamental rights or to undermine civil liberties.

Negotiation of ACTA as Stand-Alone Agreement

The present international organizational architecture includes a number of institutions that are involved in international IPR protection and enforcement. However, the ACTA, as currently being crafted, would be an agreement that would be independent of any particular organization. On the one hand, advocates of this approach suggest that it allows the United States and other like-minded countries to advance global IPR protection more efficiently and with greater flexibility. They also assert that the ACTA is an innovative agreement that would not fit under the current

⁵⁵ Erik Wasson, "EU ACTA Document Reveals Little Agreement At Seventh Round of Talks," *Inside U.S. Trade*, February 19, 2010.

⁵⁶ Erik Wasson, "Leaked EU Document Reveals Major Differences on ACTA Provisions," *World Trade Online*, March 5, 2010.

⁵⁷ *Ibid.*

rubrics of the WTO or other international organizations.⁵⁸ A fact sheet released by the USTR stated: “We feel that having an agreement independent of a particular organization is an appropriate way to pursue this project among interested countries. We fully support the important work of the G8, WTO, and WIPO, all of which touch on IPR enforcement.”⁵⁹ On the other hand, some critics charge that the decision by ACTA participants to hold these negotiations outside of the prevailing multilateral framework is intended to bypass the concerns of developing countries or other stakeholders representing various public interests.

If the ACTA is concluded, some question whether it would exist long-term as a stand-alone agreement, or whether it would be incorporated into the TRIPS Agreement in future WTO negotiations. Some speculate that, if the latter is the case, signing on to the ACTA potentially could become a requirement for WTO accession.

Effectiveness of a New Agreement on IPR

In light of the existence of numerous international trade agreements and economic forums that address global protection and enforcement of IPR, there are some questions about the “value-added” of creating a new agreement. Supporters point out that the ACTA would build on the minimum standards set forth in the WTO TRIPS Agreement. They maintain that the ACTA would fill in the gaps between current legal frameworks and enforcement practices, particularly in the case of IPR infringement in the digital environment. They also hold that implementation of the ACTA would extend the higher standards of IPR enforcement found in the U.S. FTAs with Australia, Morocco, and Singapore and the proposed U.S. FTA with South Korea to a wider group of countries. The U.S. Chamber released a statement following the seventh round of negotiations in Mexico, stating “If fully implemented, this agreement [the ACTA] has the potential to raise the bar for IP protection and enforcement around the world. We firmly believe that concluding an agreement this year will help protect U.S. jobs, American consumers, and stimulate our economy.”⁶⁰

In addition, establishing a contingency of nearly forty countries that support ramping up efforts to combat counterfeiting and piracy may send a clear, powerful signal to the rest of the world about the importance of global IPR protection and apply pressure on countries where counterfeiting and piracy continue to be serious problems.⁶¹ A larger group of countries also may dispel the perception that the global advancement of IPR efforts is primarily a unilateral U.S. initiative. Since the advent of the TRIPS Agreement, the United States often has been perceived, for better or worse, as a key champion of IPR.

Critics view the ACTA as potentially duplicative, arguing that the proposed elements of the ACTA suggest significant overlap with the WIPO Internet treaties and the WTO TRIPS Agreement.

⁵⁸ European Commission, “Q&As on the Anti-Counterfeiting Trade Agreement,” January 2009, http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142040.pdf.

⁵⁹ USTR, “Trade Facts: Anti-Counterfeiting Trade Agreement (ACTA),” August 4, 2008, http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file760_15084.pdf.

⁶⁰ U.S. Chamber, “U.S. Chamber Urges Further Progress in Mexican ACTA Negotiations: Chamber’s Global IP Center Calls for Increased Transparency,” press release, January 26, 2010.

⁶¹ Delegation of the European Commission, “EU/NR 75/08: Anti-Counterfeiting: E.U., U.S. and Other Meet in Washington to Advance ACTA,” press release, July 31, 2008, http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=2418&Itemid=58.

Some observers note that some countries have not fulfilled their obligations under these international frameworks completely. From this perspective, they question the effectiveness of pursuing new trade agreements and potentially directing greater financial or staff resources when mechanisms currently exist to address the issues, but are not being utilized effectively.⁶²

The advancement of trade negotiations in multilateral venues has stalled recently. The WTO Doha Round of multilateral trade negotiations are at a standstill over country differences on agricultural and industrial tariffs. WIPO members have not been able to reach an agreement on potential new elements for discussion on the WIPO global patent agenda.⁶³ Some observers speculate that, with a slowdown in multilateral negotiations, there may be more interest from the United States and other trading partners in advancing negotiations on IPR and other trade issues through more select groups of countries through a plurilateral process. With smaller groups of trading partners, such agreements may be negotiated more easily and quickly.

Still others question how much “teeth” an executive government-to-government agreement on IPR protection and enforcement can have if it does not increase legal protections. Some counter that, for many countries, IPR laws “on the books” are adequate, but shortcomings arise in enforcement of those laws. The ACTA, they argue, can play a critical role in addressing these gaps. Others point out that while the ACTA may not result in a statutory change in U.S. law, it could have a significant impact on the global protection of intellectual property by resulting in the need for other countries to change or enforce their laws. For instance, adhering to ACTA provisions may result in Canada’s enforcement of IPR in the digital environment, a longstanding issue between the United States and Canada.

Dispute Settlement Under ACTA

If ACTA includes a legal framework, there has been speculation about how disputes that arise under that new framework would be arbitrated. Some ACTA participants reportedly have advocated for the creation of a dispute settlement mechanism, in a vein similar to the mechanism in the WTO, that would involve binding results. Others reportedly have called for a tool similar to the WTO’s trade policy reviews, which have more of an advisory role in trade disputes. A question raised by this debate is, if disputes arise that involve both ACTA and TRIPS Agreement commitments, would such cases be adjudicated in parallel systems, or would one treaty’s mechanism for settling disputes take precedence, assuming that the ACTA does have some sort of dispute settlement mechanism?⁶⁴

Implications for Congress

As mentioned earlier, the Administration is negotiating the ACTA as an executive agreement, meaning that the agreement would not be subject to congressional approval, unless it were to

⁶² “IP Justice Comments to USTR on the proposed Anti-Counterfeiting Trade Agreement,” March 21, 2008.

⁶³ Daniel Pruzin, “No Agreement at WIPO on Patent Agenda; Developing Countries Push for Exceptions,” *International Trade Daily*, February 9, 2010.

⁶⁴ Erik Wasson, “ACTA Negotiations Delayed by U.S. Request; No New Date Set,” *Inside U.S. Trade*, February 20, 2009.

require statutory changes to U.S. law. According to the USTR, the United States is negotiating the ACTA under a premise of consistency with U.S. law.

However, some Members of Congress have raised concerns about the extent to which the ACTA may constrain congressional ability to change U.S. IPR laws.⁶⁵ There is concern that the ACTA may “cement” the Digital Millennium Copyright Act (DCMA) or affect patent reform efforts. In a January 6, 2010 letter to the USTR, Senator Ron Wyden queried whether the USTR is “reviewing negotiating proposals to ensure that no agreement would constrain the ability of Congress to reform our domestic IPR laws?”⁶⁶ USTR responded: “We do not view the ACTA as a vehicle for changing U.S. law. We are also cognizant of the desire in Congress for flexibility in certain areas, and have worked to shape relevant U.S. proposals to provide appropriate flexibility.”⁶⁷

While Congress has not established a consultative role for itself in statute, as it has with regard to certain trade agreements in the past⁶⁸, Congress still may play an oversight and consultative role during the negotiation process and engage in oversight of its implementation. This congressional oversight role is rooted in the U.S. Constitution. Article 1, Section 8 of the Constitution provides Congress with the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” and “to regulate Commerce with foreign Nations.” In addition, Article 1, Section 8 empowers Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

If the ACTA is concluded, implementation of the agreement may raise questions for Congress about the allocation of federal funds. Implementation of the agreement may require congressional action in terms of the appropriation of federal funds, even though changes in federal laws are not required. How does protection and enforcement of IPR rank among other national priorities? Within the realm of combating counterfeiting and piracy, there also are questions about what forms of IPR infringements should be given priority in addressing. Rationales cited for the ACTA include the commercial losses sustained by legitimate businesses from IPR infringement, as well as health and safety concerns associated with counterfeit and pirated products. Among these myriad concerns, what forms of infringement should be given priority if resources are limited?

For some Members of Congress, negotiations on the ACTA may raise questions about the future of U.S. trade policy. Does the ACTA set a precedent for conducting future efforts on IPR protection and enforcement primarily or increasingly outside of multilateral frameworks? How might provisions in the ACTA coincide or conflict with negotiating objectives set by Congress in any future trade promotion authorities given to the President? Would accession to the ACTA be a

⁶⁵ It should be noted that Congress may enact legislation that is inconsistent or in conflict with a U.S. international agreement and, if the legislation is signed by the President, the new statute would prevail as domestic law. At the same time, the U.S. international obligation would remain and the United States might need to address concerns raised by other agreement parties regarding the consistency of U.S. law with the agreement. See generally Restatement (Third) of the Foreign Relations Law of the United States § 115(a) (1987).

⁶⁶ Letter from The Honorable Ron Wyden, U.S. Senator, to The Honorable Ron Kirk, U.S. Trade Representative, January 6, 2010.

⁶⁷ Letter from The Honorable Ron Kirk, U.S. Trade Representative, to The Honorable Ron Wyden, U.S. Senator, January 28, 2009.

⁶⁸ See, for example, the Bipartisan Trade Promotion Authority Act (BTPAA) of 2002.

requirement for signatories to future U.S. regional and bilateral FTAs? And would a country's fulfillment of ACTA commitments affect USTR determinations for its Special 301 watch lists?

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